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KHAIRUDDIN ABU HASSAN v. WAN AEDIL WAN ABDULLAH & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
SEE MEE CHUN JCA
AZHAHARI KAMAL RAMLI JCA
B AHMAD KAMAL MD SHAHID JCA
[CIVIL APPEAL NOS: W-01(NCVC)(W)-692-09-2022
& W-01(NCVC)(W)-713-09-2022]
11 MARCH 2025

C

Abstract – *(i) When an arrest is premised on a police report, and the police report shows no evidence that the plaintiff is engaged in detrimental activities, and that there is no reasonable and probable cause for the arrest, it would render the arrest unjustified and the detention unlawful; (ii) Due to competing needs in malicious prosecution, reasonable and probable cause and malice are separate elements which serve different purposes. The absence of reasonable and probable cause does not equate to the presence of malice.*

D

E ***CRIMINAL PROCEDURE:*** *Arrest – Unlawful detention – Whether there was basis for arrest – Arrest premised on police report – Whether police report showed plaintiff engaged in activity detrimental to Parliamentary democracy – Whether there was reasonable and probable cause – Whether arrest justified under ss. 124C and 24L of Penal Code*

F ***TORT:*** *Unlawful detention – Arrest – Arrest premised on police report – Whether there was basis for arrest – Whether police report showed plaintiff engaged in activity detrimental to Parliamentary democracy – Whether there was reasonable and probable cause – Whether arrest justified under ss. 124C and 24L of Penal Code*

TORT: *Malicious prosecution – Elements – Whether absence of reasonable and probable cause equate to presence of malice – Whether prosecution actuated by malice or only to carry law into effect – Whether there were acts of oppression – Whether malice proved*

G

The plaintiff was a private individual who lodged a police report which set in motion his arrest and detention thereby leading to the present suit. The
H police report was a request for the police to investigate into the affairs of 1MDB. Subsequently, the plaintiff made a few trips abroad to hand over a copy of his police report to the relevant agencies. One Mohammad Faisal ('Faisal') lodged a police report ('complainant police report') which led to the plaintiff's arrest. D1 was the police officer who arrested the plaintiff ('first
I arrest') for an offence under s. 124C of the Penal Code ('PC'), which related

to the offence of an attempt to commit activity detrimental to Parliamentary democracy. Upon the plaintiff's release, he was re-arrested by D2 on the same day ('second arrest') under s. 4(1) of the Security Offences (Special Measures) Act 2012 ('SOSMA'), for an offence under ss. 124K and 124L of the PC. The plaintiff was charged with an offence under s. 124L of the PC which was an attempt to commit sabotage which, as per the charge sheet, was against the country's banking and financial services. The plaintiff filed a claim against the defendants for unlawful detention and malicious prosecution. The High Court Judge ('HCJ') found, *inter alia*, (i) there was nothing in the complainant police report that warranted an arrest under s. 124C of the PC; (ii) the plaintiff had discharged the burden to show that the charge under s. 124L of the PC was made without reasonable and probable cause; and (iii) the defendants did not act maliciously or vindictively against the plaintiff. The claim for malicious prosecution was dismissed while the claim for unlawful detention was allowed with general damages of RM300,000. The claim for special, exemplary and aggravated damages were also dismissed. Appeal 692 was the plaintiff's appeal against that part of the dismissal of its claim for malicious prosecution and in relation to damages. Appeal 713 was the defendants' appeal against the decision of the HCJ in allowing the claim for unlawful detention and the award of RM300,000 as general damages.

Held (dismissing Appeal 692 and Appeal 713)
Per See Mee Chun JCA delivering the judgment of the court:

(1) The first arrest was premised on the complainant police report by Faisal. However, a perusal of the report would show that there was nothing in it which could even remotely suggest the plaintiff was engaged in an activity detrimental to Parliamentary democracy or was doing an act preparatory thereto. Pursuant to s. 23(1) of the Criminal Procedure Code ('CPC'), a police officer may without a warrant arrest any person against whom a reasonable complaint has been made or credible information received or a reasonable suspicion exists of that person being concerned in any offence committed. There was simply nothing, on all fronts, for the arrest to have been made for an offence under s. 124C of the PC. This finding was fortified by the subsequent action of the defendants who did not charge the plaintiff under s. 124C of the PC. There was nothing in the complainant police report and D1's evidence that justified the plaintiff's arrest under s. 124C of the PC. There was no evidence from the defendants to rebut the plaintiff's claim of unlawful detention. (paras 46-53)

(2) The second arrest was for the offences under ss. 124K and 124L of the PC. This was the SOSMA arrest being led by D2 and the notice of detention under s. 4(5) of the SOSMA being issued by D3. Essentially,

D3 relied on what was conveyed to him by D2. D2 was not called to give evidence on the arrest of the plaintiff. The case was adjourned to give D2 time to recover from a stroke. Upon being informed that D2 was well enough to attend court, the case resumed, only for D2 to not be present whereupon the defendants closed their case. The absence of any evidence from D2 showed that there was no basis for the second arrest and the detention under SOSMA. (paras 54-64)

(3) Any challenge to the unlawfulness of a remand order is not limited to an appeal or revision under the CPC but can still be pursued if specifically pleaded in a civil action. This had been done here. The plaintiff had proven its claim on unlawful detention. (paras 68-70)

(4) D5 did not know the reason for the plaintiff being charged under s. 124L of the PC as he was only following the instruction to prosecute and he was not involved during the consideration and decision-making process to charge the plaintiff. There was essentially no evidence on reasonable and probable cause. In addition, the prosecution's documents which were served on the plaintiff did not contain anything to show sabotage. The plaintiff had shown the absence of reasonable and probable cause, where the defendants were unable to rebut the plaintiff's case when they did not even know the reasons for the charge under s. 124L of the PC. (paras 74-78)

(5) Due to the competing needs in malicious prosecution, reasonable and probable cause and malice are separate elements which serve two different purposes. It was thus in this context that the absence of reasonable and probable cause does not equate to the presence of malice. The plaintiff was essentially relying on the absence of reasonable and probable cause to point to malice but this could not be the case. The plaintiff had to prove malice premised on its assertion that the prosecution was to abet and provide fraudulent assistance to the former Prime Minister, Dato Seri Najib ('DS Najib') in the 1MDB matter and to safeguard his interest in the same. It was this assertion of malice that had not been proved. The plaintiff had not proved that the prosecution was driven by a collateral purpose to protect DS Najib nor the dominant purpose to cover up the activities of DS Najib. It had not been proved that the prosecution was actuated by malice other than only to carry the law into effect or that the dominant purpose was to assist and protect DS Najib on matters relating to the 1MDB investigation. (paras 84-92)

(6) For unlawful detention, the HCJ had considered that damages were intended as compensation and not as enrichment. Ultimately, RM300,000 was awarded as general damages. There was nothing plainly wrong in the HCJ's approach of a lump sum award and the amount. The

HCJ was mindful of the loss of freedom during the period of detention and that there were no allegations of assault or ill treatment. The action of the defendants were not oppressive or arbitrary such that exemplary damages were warranted to signify the court's indignation and disapproval. There was also no exceptional conduct of the defendants that warranted the award of aggravated damages. The defendants may have been misguided or overzealous in their pursuit but these were not accompanied by malevolence, spite, malice, insolence or arrogance. Hence, the decision of the HCJ was affirmed. (paras 93-113)

Case(s) referred to:
A v. State of New South Wales & Anor [2007] HCA 10 ***(refd)***
Abd Malek Hussin v. Borhan Hj Daud & Ors [2008] 1 CLJ 264 HC ***(refd)***
ASP Poonnam E Keling & Ors v. Sri Sanjeevan Ramakrishnan [2023] 10 CLJ 1 CA ***(refd)***
Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 7 CLJ 403 FC ***(refd)***
Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***
Miazga v. Kvello Estate [2009] 3 RCS 339 ***(refd)***
PP v. Khairuddin Abu Hassan & Anor [2017] 4 CLJ 701 CA ***(refd)***
Rawther v. Abdul Kareem [1966] CLJU 154; [1966] 1 LNS 154 FC ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors & Another Appeal [2017] CLJU 500; [2017] 1 LNS 500 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 23(1)(a)
Penal Code, ss. 124C, 124K, 124L
Security Offences (Special Measures) Act 2012, s. 4(1), (2), (5)

(Civil Appeal No: W-01(NCVC)(W)-692-09-2022)
For the appellant - Mohamed Haniff Khatri Abdulla & Nurul Huda Razali; M/s Haniff Khatri
For the respondents - Nur Edziani Roleb & Siti Syakimah Ibrahim; SFCs & Mohd Ashraf Abd Hamid; FC

(Civil Appeal No: W-01(NCVC)(W)-713-09-2022)
For the respondents - Mohamed Haniff Khatri Abdulla & Nurul Huda Razali; M/s Haniff Khatri
For the appellant - Nur Edziani Roleb, Siti Syakimah Ibrahim SFCs & Mohd Ashraf Abd Hamid; FC

[Editor's note: For the High Court judgment, please see Khairuddin Abu Hassan v. Wan Aeidil Wan Abdullah & Ors [2022] 9 CLJ 579 (affirmed).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

See Mee Chun JCA:

Introduction

B **[1]** There are two appeals being heard together, appeal 692 and appeal 713. All references to enclosures are to appeal 692 except where indicated otherwise. Parties will be referred to as they were in the High Court (HC).

[2] The plaintiff had filed a claim against the defendants for unlawful detention and malicious prosecution. The claim for malicious prosecution was dismissed while the claim for unlawful detention was allowed with C general damages of RM300,000. The claim for special, exemplary and aggravated damages were also dismissed.

[3] Appeal 692 is the plaintiff's appeal against that part of the dismissal of its claim for malicious prosecution and in relation to damages.

D **[4]** Appeal 713 is the defendants' appeal against the decision of the HC in allowing the claim for unlawful detention and the award of RM300,000 as general damages.

Parties

E **[5]** The plaintiff is a private individual who lodged a police report dated 12 December 2014 which set in motion his arrest and detention thereby leading to the present suit.

[6] D1 to D3 are senior police officers. D4 was the Inspector General of Police and the person responsible for the actions of D1 to D3. D5 is a F Deputy Public Prosecutor who conducted the prosecution of the plaintiff at the Kuala Lumpur Magistrates' Court while D6, also a Deputy Public Prosecutor, conducted the prosecution of the plaintiff at the Court of Appeal and the Federal Court. D7 was the Attorney General and the person responsible for the actions of D4 to D6. D8 is the Government of Malaysia G and the employer of all the other defendants.

Background Facts

[7] It all began on 12 December 2014 when the plaintiff lodged a police report, the relevant part of which in encl. 5/49 is as follows:

H > Setelah membaca, meneliti dan mengkaji pelbagai laporan-laporan atau pendedahan mengenai kepincangan pentadbiran kewangan syarikat 1MDB melalui artikel-artikel yang ditulis di dalam akhbar-akhbar tempatan, luar negara serta blog-blog telah membuktikan secara jelas berbagai kelemahan di dalam sistem meminjam dana mahupun cara perbelanjaan dana yang amat meragukan khususnya membabitkan wang I rakyat.

> Oleh yang demikian, saya secara sukarela ingin membuat laporan rasmi memohon pihak Polis Diraja Malaysia untuk menyiasat secara mendalam dan menyeluruh terhadap keseluruhan kakitangan pentadbiran, para pegawai, Ahli-ahli Lembaga Pengarah serta juga keseluruhan personaliti ataupun mana-mana syarikat yang terbabit dengan urus niaga meragukan dengan 1MDB.
>
> Polis Diraja Malaysia mestilah menyiasat secara telus, adil dan saksama demi untuk memelihara Integriti agar jumlah wang rakyat yang besar tidak diselewengkan atau tidak disalah urus.

The police report was a request for the police to investigate into the affairs of 1MDB. Subsequently, the plaintiff made a few trips abroad to hand over a copy of his police report to the relevant agencies.

[8] One Mohammad Faisal bin Abu Suaib Khan (Faisal) lodged a police report dated 18 September 2015 (complainant police report). From the evidence, this was the police report which led to the plaintiff's arrest.

[9] The chronology of events relating to the plaintiff's arrest and detention are set out in the table below, which we take the liberty of reproducing from the HC Judge's grounds of judgment:

No.	Date	Event
1.	12.12.2014	P lodged his P Police Report at The Dang Wangi police station
2.	1.7.2015	P and his personal lawyer, Matthias Chang Wen Chieh ("Matthias") went to Paris, France and handed over a copy of the P Police Report to Mr Regis Ponnela, Chief Police Officer for the Criminal Division of Economics & Finance.
3.	18.8.2015	P and Matthias went to Switzerland and handed over a copy of the P Police Report to the office of the Attorney General of Switzerland.
4.	19.8.2015	P and Matthias went to England and handed over a copy of the P Police Report to the Metropolitan Police Station, Charling Cross, United Kingdom.
5.	2015	P also went to Hong Kong and Singapore on his own to hand over a copy of the P Police Report to the authorities in those 2 countries.
6.	18.9.2015	P was arrested by a team of police officers led by D1 and was brought to the Dang Wangi police headquarters. P was later handed over to D2 for an investigation under s. 124C of the Penal Code.

7.	19.9.2015	P was brought before the Kuala Lumpur Magistrate Court. An order for a remand detention of 6 days under s. 117 of the Criminal Procedure ("CPC") was issued by the Magistrate.
8.	23.9.2015	P was brought before the Magistrate and was released from the remand order. P was again arrested by a team of police officers led by D2 under s. 4(1) of the Security Offences (Special Measures) Act 2012 ("SOSMA") for offences under ss. 124K and 124L of the Penal Code. P was served with the Notification Form for the Grounds of Arrest under s. 4(2) of SOSMA.
9.	14.9.2015	P, accompanied by this team of lawyers, was brought before D3. D2 appeared for the police and applied for P to be detained for 28 days under SOSMA. D3 issued an order of detention for 28 days. P was served with the Notice of Detention under s. 4(5) of SOSMA.
10.	28.9.2015	P's solicitors filed an application for *habeas corpus* in the Kuala Lumpur High Court to challenge P's detention under SOSMA. The *habeas corpus* application was fixed for hearing on 13 October 2025
11.	12.10.2015	P was brought before the Magistrate for the charge to be read against him. P instructed his solicitors to withdraw the *habeas corpus* application because it had become academic 1 day before the *habeas corpus* hearing.
12.	12.10.2015	P was charged with an offence under section 124L of the Penal Code. The charge proceedings was led by D5. P's solicitors raised legal issues that the charge sheet, does not contain any reference to SOSMA, which were dismissed by the Magistrate who then refused bail. The Magistrate fixed a mention date on 26 October 2015.
13.	12.10.2015	P's solicitors wrote to the Deputy Registrar of the Kuala Lumpur High Court and sought to review the decision of the Magistrate decision above. The High Court instructed P's solicitors to file a review application under s. 323 of the CPC.

14.	13.10.2015	P's solicitors filed a Notice of Motion to the High Court for orders, among others, that the charge under s 124L of the Penal Code does not fall within the ambit of SOSMA. The Notice of Motion was fixed for hearing on 19 October 2015.
15.	19.10.2015	The High Court directed that the motion be referred to the Federal Court.
16.	3.11.2015	The Federal Court transferred back the matter to be disposed off at the High Court first
17.	5.11.2015	Hearing of the motion at the High Court.
18.	18.11.2015	The High Court ruled that the charge against P does not fall under SOSMA. P was released on bail.
19.	13.11.2016	The Court of Appeal dismissed the Prosecution's appeal and affirmed the High Court decision dated 18 November 2015.
20.	27.4.2017	The Federal Court struck out the Prosecution's appeal due to breach of r. 88 of the Rules of the Federal Court 1995.
21.	12.5.2017	The Prosecution, through D6, informed the Sessions Court that it did not wish to proceed with the charge against P and asked for order of DNAA (Discharge not amounting to acquittal). Upon application by P's solicitors, P was granted an acquittal.

[10] D1 was the police officer who arrested the plaintiff on 18 September 2015 (the first arrest) for an offence under s. 124C of the Penal Code (PC). Upon the plaintiff's release on 23 September 2015, he was rearrested by D2 on the same day (the second arrest) under s. 4(1) of the Security Offences (Special Measures) Act 2012 (SOSMA) for an offence under ss. 124K and 124L of the PC.

[11] The plaintiff's claim for unlawful detention is for the period from 18 September 2015 until 18 November 2015 and malicious prosecution for the period from 12 October 2015 until 12 May 2017.

Decision Of HC

[12] The grounds of judgment (GOJ) of the HC Judge (HCJ) can be found in encl. 19/19-60.

First Arrest

[13] The first arrest was carried out by D1 on 18 September 2015 for an offence under s. 124C of the PC.

[14] The HCJ found that the test to determine if an arrest is warranted is not the existence of the complainant police report but if there is credible information or reasonable suspicion. Reference was made to s. 23(1)(a) of the Criminal Procedure Code (CPC).

[15] D1 had confirmed that the first arrest was for an offence under s. 124C of the PC. This related to the offence of an attempt to commit activity detrimental to Parliamentary democracy. The HCJ found there was nothing in the complainant police report that warranted an arrest under s. 124C of the PC. The concept of Parliamentary democracy lies on the notion that the ultimate responsibility of making laws lies with Parliament.

[16] The HCJ also stated that D1 had agreed in cross-examination that there was nothing in the complainant police report that the plaintiff was doing anything detrimental to Parliamentary democracy. Given DT's evidence that the arrest was pursuant to the instruction of his superior officer ACP Mokhtar bin Md Noor and that D1 did not seem fully conversant with the background or reason, the HCJ noted it would be helpful to hear ACP's Mokhtar's evidence on circumstances which led to the first arrest. No adverse inference was drawn for the defendants' failure to call ACP Mokhtar as a witness as no suppression of material evidence or withholding of a material witness, had been shown.

[17] At para. 36, the HCJ's finding on the first arrest was as follows:

> 36. Nevertheless, I agree with P that based on the Complainant Police Report, there is nothing that warrants P to be arrested for an offence under s. 124C of the Penal Code. The defendants failed to adduce any evidence to rebut the same, in the absence of the testimony of ACP Mokhtar that a reasonable complaint has been made or credible premises, I find that P has established that his first arrest and detention for 6 days from 18.9.2015 until 23.9.2015 is unlawful.

Second Arrest

[18] The second arrest was led by D2 under s. 4(1) of the SOSMA, for an offence under ss. 124K and 124L of the PC. On 12 October 2015, the plaintiff was charged with an offence under s. 124L of the PC which is an attempt to commit sabotage which as per the charge sheet was against the country's banking and financial services. On 16 November 2015, the High Court found that s. 124L of the PC did not fall within the ambit of the SOSMA and the plaintiff was released on bail.

[19] The HCJ stated that the power given to the police under s. 4(5) of the SOSMA should be exercised with great care and sparingly. The HCJ found that D3 had ordered the 28 days remand without even knowing the nature of the offence committed by the plaintiff. D3's evidence was that the case was complicated, involved many witnesses whose statements had to be recorded,

and documents from abroad had to be gathered. According to the HCJ, D3 did not consider the circumstances and facts of the case to ensure whether it really fell under the SOSMA. D3 had also stated the 28 days remand applied by D2 was to assist an investigation under s. 124C of the PC whereas the relevant forms showed it was for an offence under ss. 124K and 124L of the PC.

[20] There had also been an admission by D3 that he might not have granted the remand had he been fully cognisant of the circumstances and facts of the case by D2. D2 did not give evidence although the case was adjourned to give him time to recover from stroke. Upon being informed that D2 was well enough to attend court, the case resumed, only for D2 not to be present. The defence decided to close its case. The HCJ did not draw an adverse inference as this was not an instance where a material witness had been withheld. However, the failure of D2 to give evidence had discredited the defendants' case and strengthened the plaintiff's case on the second arrest.

[21] At paras. 57 and 58, the HCJ found as follows:

> 57. In the instant case. I am satisfied that no reasonable complaint has been made or credible information has been received or reasonable suspicion exists for P to be arrested and detained under SOSMA. P also was not properly informed of the particulars and grounds for his detention under SOSMA. Recall that the material upon which the defendants arrested and detained P was the complainant police report. As alluded to earlier, the complainant police report seems rather insufficient to justify arrest and detention, especially under SOSMA.
>
> 58. Based on the totality of the evidence, I find that there was no reasonable or probable cause for P to be arrested and detained under ss. 124K or 124L of the Penal Code. There was no reason to believe that P was involved in security offences under s. 4(1) of SOSMA.

Non-justiciability

[22] On the non-justiciability of the remand order, the HCJ relied on the Federal Court case of *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403 that any challenge to the unlawfulness of a remand order is not limited to an appeal or revision under the CPC but can still be pursued if specifically pleaded in a civil action.

[23] With regard to the non-justiciability of the discretion to prosecute, this was not about the denial of prosecutorial authority but the abuse of such authority. The court should not abdicate its judicial function where a person has been unlawfully detained. Reference was again made to *Hassan Marsom* where courts ought not wear blinkers and fold its arms oblivious to the horror stories and allegations of police brutality and custodial assault.

A *Malicious Prosecution*

[24] On the claim for malicious prosecution, the Federal Court case of *Rawther v. Abdul Kareem* [1966] CLJU 154; [1966] 1 LNS 154; [1966] 2 MLJ 201 was relied on as to the five elements that the plaintiff was required to prove.

B

[25] The first and second elements namely the defendants set the criminal law in motion against the plaintiff; and the proceedings terminated in the plaintiff's favour had been proved as the plaintiff was charged under s. 124L of the PC and acquitted on 12 May 2017.

C *Reasonable And Probable Cause*

[26] On the third element of reasonable and probable cause, and relying again on *Rawther*, this required an honest belief in the guilt of the accused founded upon reasonable grounds.

D **[27]** The HCJ found that D5 did not know the reason for the plaintiff being charged under s. 124L of the PC as he was only following the instruction to prosecute and he was not involved during the consideration and decision-making process to charge the plaintiff. It was the Solicitor General 1 who would know.

E **[28]** Further, the prosecution's documents which were served on the plaintiff did not contain anything to show sabotage. Nothing was produced as to the documents which D3 had said earlier when justifying the 28 days remand on gathering of documents from abroad and recording of statements from witnesses.

F **[29]** The plaintiff was found to have discharged the burden to show that the charge under s. 124L of the PC was made without reasonable and probable cause. The defendants had failed to call relevant witnesses with personal knowledge and therefore the plaintiff's assertion of no reasonable and probable cause for prosecution remained unrebutted.

G *Malice*

[30] The HCJ however was not convinced the defendants were actuated by malice, in that they had a motive other than to carry the law into effect.

[31] It was firstly noted that reasonable and probable cause and malice are
H separate elements and serve different purposes. Reference was made to a Supreme Court case of New South Wales in *A v. State of New South Wales & Anor* [2007] HCA 10 where malice is said to be the positive requirement and absence of reasonable and probable cause is the negative requirement where each have a separate role to play in the tort of malicious prosecution.
I Malice was described as acting for purposes other than a proper purpose of instituting criminal proceeding.

[32] The plaintiff's case was that the prosecution was made solely to abet and provide fraudulent assistance to the then-Prime Minister, Finance Minister and Chairman of 1MDB, Dato Sri Mohammad Najib bin Tun Abdul Razak (DS Najib) and to solely safeguard the interest of DS Najib. This was with reference to paras. 40 and 49 of the amended statement of claim and Q&A 40 of the plaintiff's witness statement. This was also the evidence in cross-examination.

[33] The HCJ found this to be a bare assertion unsupported by evidence and that DS Najib was not a party to the suit.

General Damages

[34] The HCJ was of the view that RM1,581,000 being claimed for 62 days of unlawful detention was exorbitant. Damages are to be reasonable and not excessive and intended to serve as compensation. The claim of RM30,000 per day based on multiplier and multiplicand did not find favour for the reasons below:

> 100. Firstly, I prefer the approach of a lump sum award. Rather than a simple arithmetic calculation based on a sum of RM30,000 per day (which seems rather arbitrary) multiplied by the number of days of detention. Secondly, the *Abd Malek Hussin* (*supra*) case relied upon by P adopted a downward adjustment of about half (50%). P however proposed a lesser reduction of 30% in his case. Thirdly, P seeks an increase of 15% on account of aggravating factors. Without in any way belittling his unfortunate experience, I note that there is no allegation of assault and battery or ill treatment of P whilst he was in detention.

[35] At para. 104 the following was further stated:

> 104. In my opinion, a lump sum award would be appropriate in the present case. This avoids a mathematical calculation using an arbitrary sum, whether it be RM25,000 to RM30,000 or any other figure. It also has the advantage of not having to do a downward or upward adjustment, whether 30% or 15% or any other arbitrary percentage. I have taken into account relevant factors including P's loss of liberty, length of his detention and injury to his reputation. Considering the circumstances of this case, my view is that a lump sum of RM300,000 would be reasonable as compensation for P's false imprisonment.

[36] An award of RM300,000 was given to fall in between an award for death in custody and an award for defamation.

[37] No award for malicious prosecution was made since no liability was established. The award of RM14,764,500 being claimed was manifestly excessive and a lump sum award would have been made.

Exemplary Damages

[38] The HCJ dismissed the claim of RM2.6 million as exemplary damages. Guided by the cases of *Rookes v. Barnard* [1964] AC 1129 and *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And*

A *Another Appeal* [2017] CLJU 500; [2017] 1 LNS 500; [2018] 1 MLJ 784, it was found that the defendants had not acted vindictively or maliciously nor were their actions oppressive or arbitrary.

Aggravated Damages

B **[39]** The HCJ dismissed the claim of RM1 million as exemplary damages. For there to be such an award, there had to be exceptional or contumelious conduct or motive on the part of the defendants, for which there was none.

Special Damages

C **[40]** The HCJ dismissed the claim for special damages of RM795,000 for legal fees. This had not been pleaded and particularised nor strictly proved. The fee letter dated 14 June 2017 was unclear as when any discussion or agreement took place. The plaintiff had not responded to the fee letter and it could be inferred that the plaintiff did not pay, because from the start, it was on a *pro bono* basis.

D

Our Decision

Claim For Unlawful Detention

[41] The plaintiff's claim for unlawful detention is for the period from E 18 September 2015 (date of arrest under s. 124C of the PC) until 18 November 2015 (date of release on bail). This spans a period of 62 days. What has been termed as the first arrest is for the period from 18 September 2015 until 23 September 2015 (date of release from remand). The second arrest is for the period from 23 September 2015 (arrest for offences under ss. 124K and 124L of the PC) to 18 November 2015.

F

First Arrest

[42] It is undisputed that D1 was the police officer who made the first arrest. Other than the arrest, he played no role in the subsequent investigation (encl. 4/116). In his Q&A 6, he stated he received instructions from ACP G Mokhtar to arrest the plaintiff and in Q&A 8 that the plaintiff was arrested for further investigation "kerana disyaki secara syak dan munasabah telah melakukan kesalahan di bawah s. 124C Kanun Keseksaan" He understood s. 124C to be "aktiviti yang menggangu atau menggugat demokrasi berparlimen." (encl. 4/117), It was further his evidence that the arrest was H in relation to the complainant police report dated 18 September 2015 by Faisal (encl. 4/117).

[43] D1's evidence thus was that the arrest was for an offence under s. 124C of the PC and it was premised on the complainant police report by Faisal.

I

[44] Section 124C of the PC provides as follows:

> **Attempt to commit activity detrimental to parliamentary democracy**
>
> 124C. Whoever attempts to commit an activity detrimental to parliamentary democracy or does any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years.

[45] Parliamentary democracy essentially means a system of Government where the people elect their representatives to Parliament to enact laws. In *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169, this court said as follows in p. 193:

> There is nothing startling in the trial judge holding the first and fourth defendants to be fiduciaries in public law. *In a system of Parliamentary democracy modelled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation*. The donee of the power – the public body – may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is the case here. At other times it is to be exercised for the general good of the nation as a whole, that it to say, in the public interest. But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty.
>
> (emphasis added)

[46] Since the arrest was premised on the complainant police report by Faisal, we find it necessary to reproduce it (encl. 5/54) as follows:

Pengadu Menyatakan:

> Pada 17/9/2015 Jam Lebih Kurang 1945hrs Semasa Saya Berada Di Restoran Makan Di KTMB Kuala Lumpur Telah Melayari Internet Facebook Mengunakan Telefon Bimbit Milik Saya Jenis Samsung Note 5, Telah Terbaca Satu Artikel Posting Penama Pemilik akaun Facebook - Khairuddin Bin Abu Hassan - Yang Bertajuk - Polis Peranchis Mula Bertindak Ke Atas Laporan Saya Mengenai Skandal 1MDB - Di URL https://www.facebook.com/379029638934666/photos/a.459215744269388.1073741827.379029638934666/486220801548882/ Yang Di Posting Pada 21 Ogos 2015 Jam Lebih Kurang 1227 Hrs Yang Mendapat 3642 Likes Pada Posting Artikel Tersebut. Dalam Kenyataan Artikel Tersebut Ada Kandungan Yang Menyatakan - sebagai contohnya, asas siasatan pdrm telah dipesongkan kepada siasatan ke atas justo yang ditangkap di thailand, clare brown editor Sarawak Report dan beberapa Pegawai SPRM serta BNM disoal-siasat! Empat orang anggota PAC pula dilantik sebagai timbalan-timbalan menteri secara tiba-tiba akhirnya membantutkan struktur serta proses siasatan oleh PAC-pada Pendapat

A Saya, Kenyataan Artikel Tersebut Adalah Dipercayai Palsu Atau Membuat Kenyataan Palsu Yang Berkemungkinan Menyebabkan Kecemasan Awam. Saya Membuat Laporan Polis Adalah Untuk Siasatan Tan Pihak Polis. Sekian Laporan Saya.

[47] A perusal of the above would show there is nothing in it which can B even remotely suggest the plaintiff was engaged in an activity detrimental to Parliamentary democracy or was doing an act preparatory thereto.

[48] D1 had in fact in cross-examination and in reference to the complainant police report, agreed that nowhere was it mentioned that the plaintiff's article had threatened Parliamentary democracy; that the SPRM C investigation which had "terpesong" to personalities such as Justo, Claire Brown, officers of SPRM and BNM, were not part of Parliament and that PACC was a small entity of Parliament. Refer to encl. 4/118-119.

[49] Pursuant to s. 23(1) of the Criminal Procedure Code, a police officer may without a warrant arrest any person against whom a reasonable D complaint has been made or credible information received or a reasonable suspicion exists of that person being concerned in any offence committed. There was simply nothing, on all fronts, for the arrest to have been made for an offence under s. 124C of the PC.

E **[50]** This finding is fortified by the subsequent action of the defendants who did not charge the plaintiff under s. 124C of the PC.

[51] We also have D1's evidence that he arrested the plaintiff on ACP Mokhtar's instruction and that the ACP would "lebih tahu" on the reason for the arrest. At encl. 4/121, this was asked and answered:

F HK: Baik. Takpa. Jadi Setuju atau tidak yang boleh memberi penjelasan berkaitan arahan menangkap atas laporan ini adalah sebenarnya mungkin ACP Mokhtar bin Md Noor? Sebab dia yang bagi arahan. Betul?

DSP Wan: Betul.

G HK: Dia lebih tahu kenapa dan apa maksudnya di bawah Seksyen 124C.

DSP Wan: Betul.

[52] In re-examination, D1 explained he was not certain as to why s. 124C H was invoked as he was the arresting officer and not the investigating officer but nevertheless he was "yakin" with the directions of his superior officers. Refer to encl. 4/127.

[53] We find that D1 did not know the reasons behind the plaintiff's arrest and that ACP Mokhtar would have been well-positioned to explain the I reasons. There was nothing in the complainant police report and D1's evidence that justified the plaintiff's arrest under s. 124C of the PC. Absent the evidence of ACP Mokhtar, there was no evidence from the defendants to rebut the plaintiff's claim of unlawful detention.

Second Arrest

[54] The second arrest is for the period from 23 September 2015 (arrest for offences under ss. 124K and 124L of the PC) to 18 November 2015. This would be the SOSMA arrest with the arrest being led by D2 and the notice of detention under s. 4(5) of the SOSMA being issued by D3.

[55] The plaintiff was charged with an offence under s. 124L of the PC:

> **Attempt to commit sabotage**
>
> 124L. Whoever attempts to commit sabotage or does **not** any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years.

[56] The charge read as follows:

> **PERTUDUHAN**
>
> Bahawa kamu antara 28 Jun 2015 hingga 26 Ogos 2015 di beberapa lokasi iaitu
>
> (a) Di Pejabat Ketua Polis Bahagian Jenayah Ekonomi dan Kewangan Paris, Perancis
>
> (b) Balai Polis Charing Cross, London, United Kingdom
>
> (c) Pejabat Peguam Negara Switzerland, Bern, Switzerland
>
> (d) Balai Polis Wai Chan, Hong Kong dan
>
> (e) Ibu Pejabat Polis Cantonment, Singapore
>
> bagi mencapai niat bersama, kamu telah melakukan dengan niat, cubaan untuk melakukan sabatoj terhadap perkhidmatan perbankan dan kewangan Negara dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 124L, Kanun Keseksaan (Akta 574) dan dibaca bersama Seksyen 34 Kanun Keseksaan.
>
> **HUKUMAN:**
>
> Jika disabitkan hendaklah diseksa dengan penjara selama tempoh lima belas tahun.

On 18 November 2015, the High Court held that s. 124L of the PC does not fall under the SOSMA and the plaintiff was released on bail.

[57] D3 who allowed the plaintiffs 28 days remand did not know about the nature of the offence committed by the plaintiff. He explained the reasons for the 28 days given as follows (encl. 4/134):

> ACP Habibi : Bila kita lihat kes ni agak complicated dan melibatkan ramai saksi. Pada masa tersebut tuan Muniandy ada memohon kepada saya untuk merakam beberapa statement rakaman percakapan saksi dan mendapatkan beberapa dokumen termasuk di luar negara untuk dikumpulkan dalam siasatan kes dia.

A

Jadi kalau tempoh sehari dalam tempoh tangkapan tu adalah kira agak payah untuk menyelesaikan siasatan. Jadi, saya berpuas hati apabila tuan Muniandy sebagai pegawai penyiasat memberi alasan, 2, 3 alasan seperti mendapatkan dokumen-dokumen dari luar negara, merakam percakapan saksi dan beberapa alasan lagi yang menyakinkan saya untuk memberi tahanan selama 28 hari."

B

[58] Then came the following questions and answers at encl. 4/151-153:

HK: Maka saya cadangkan kepada awak, apabila ASP Muniandy membawa dokumen pada muka surat 86.

C

ACP Habibi: Ok

HK: Yang ada tiga butiran tersebut, dan mengatakan pemohon ditahan di bawah THSLee Report tersebut maka sepatutnya awak perlu minta dia tunjukkan salinan repot untuk awak sendiri baca. Untuk awak sendiri tahu apa kandungan repot. Setuju?

D

ACP Habibi: Contoh salinan report tu?

HK: Nak contoh apa?

ACP Habibi: Maksud salinan repot tu?

E

HK: Kan di muka surat 86 ada repot TSHL 31165-

ACP Habibi: Ya. Baik.

HK: Cadangan saya, awakpatut minta tengok dan baca sendiri?

F

ACP Habibi: Ya.

HK: Setuju.

ACP Habibi: Setuju.

G

HK: Dan apabila awak baca THSL 31165/15, dia merujuk kepada posting Khairuddin Abu Hassan.

ACP Habibi: Ya.

HK: Jadi awak patut minta tengok posting Khairuddin Abu Hassan dan buat keputusan sendiri. Setuju?

H

ACP Habibi: Setuju.

HK: Dan bila awak tengok permohonannya adalah seksyen 124K dan 124L, maka awak perlu lihat semua dokumen ini dan membuat satu Analisa dalam minda awak, adakah terdapat asas untuk terus menyiasat di bawah 124K dan L seperti yang dipohon. Setuju? Itu tanggungjawab awak juga.

I

ACP Habibi: Maksudnya, dia tunjukkan?

HK: Maksudnya, bila permohonan 12K dan L, maka awak kena tengoklah semua ni. Nak tengok perlu ke tahan bawah K dan L. Betul ke di bawah K dan L? Awak mempunyai tanggungjawab untuk selidik asas sebelum bagi perintah. Itu saja cadangan saya. Setuju?

ACP Habibi: Pada masa itu, tidak.

HK: Tidak?

ACP Habibi: Tidak.

HK: Oh ertinya awak tak setuju lah?

ACP Habibi: Tak setuju.

HK: Yang awak tak payah buat itu semua?

ACP Habibi: Sebab dia-

HK: Awak tak perlu buatlah? Awak tak perlu buat semua tu?

ACP Habibi: Pada masa itu.

HK: Maksudnya pada masa itu awak just dengar apa pegawai penyiasat cakap?

ACP Habibi: Dengar.

HK: Tapi apa yang dia cakap, tidak ditulis. Setuju?

ACP Habibi: Dia tulis.

HK: Hari ini, hari kita Cuma ada tiga muka surat ni saja. Jika dibandingkan dengan 15 muka surat Majistret. Itu point saya. Point saya, apa yang awak kata Muniandy cakap kepada awak, awak tak boleh tunjukkkan kepada Mahkamah. Setuju?

ACP Habibi: Ya.

HK: Jadi kita tak tahu apa yang Muniandy cakap tu betul atau tidak boleh menyakinkan dengan munasabah permintaan reman di bawah seksyen 4(5). Setuju?

ACP Habibi: Secara lisan, meyakinkan.

For context, report TSHL 31165 is the complainant police report.

[59] Earlier, this transpired (encl. 4/140):

HK: Now kita lihat. Cuba kita tengok butir-butir. Muniandy ada bagitahu, dengan izin Yang Arif, DSP Muniandy ada bagitahu butir-butir kes TSHL 31165/15, dia bagitahu? Maksudnya semestinya laporan polis ini telah dibawa bersama dengan awak, bersama kepada awak. Setuju?

A

ACP Habibi: Setuju.

HK: Kenapa awak tidak membaca laporan itu?

ACP Habibi: Sebab tuan Muniandy sudah terangkan secara verbal.

HK: Dia terangkan secara verbal tapi awak sebagai pegawai yang akan melaksanakan tugas, Saya cadangkan kepada awak telah jadi tanggungjawab awak untuk menyakinkan diri awak untuk melihat dokumen juga. Setuju? Dokumen dan dibawa, dengar satu hal, baca. Setuju tak setuju?

B

C

ACP Habibi: Bagi saya, memadai keterangan secara verbal yang dibagi oleh tuan Muniandy.

[60] Essentially D3 relied on what was conveyed to him by D2. D2 was not called to give evidence on the arrest of the plaintiff. As noted by the HCJ, the case was adjourned to give D2 time to recover from stroke. Upon being informed that D2 was well enough to attend court, the case resumed, only for D2 not to be present whereupon the defendants closed their case.

D

[61] To compound matters, D3 said the following (encl. 4/139):

ACP Habibi: Yang Arif, dua tiga kali saya ada maklumkan tadi. Perkara-perkara yang dipohon oleh tuan Muniandy adalah berkaitan dengan pelanjutan 28 hari tu untuk membantu siasatan dia bagi mendapat keterangan di bawah Seksyen 124C tadi tu.

E

HK: 124C?

ACP Habibi: Yaya.

F

[62] This answer suggested the investigation was for an offence under s. 124C PC which in fact, was for the first arrest. He was not re-examined on his answer.

[63] With reference to encl. 4/191, D3 had also not discounted the possibility of not allowing the detention had D2 informed him of certain facts and circumstances:

G

HK: Saya faham, Tuan ACP telah pun menyatakan dalam kenyataan saksi daripada apa yang diceritakan oleh ASP Muniandy Tuan ACP yakin untuk keluarkan remand. Soalan saya lain, soalan saya ialah kalaulah Tuan ASP Muniandy berpeluang nak maklumkan segala rentetan peristiwa yang kita huraikan tadi dan membawa perhatian kepada Tuan ACP. Maka ada kemungkinan Tuan ACP tidak akan memberikan rentetan tersebut. Kerana orang yang disiasat telah memulakan siasatan di luar negara. Maka bagaimanakah mungkin akan tercetus apa yang dia buat menjadi bahaya kepada demokrasi berparlimen. Menjadi bahaya kepada system kewangan sedangkan

H

I

negara luar sedang siasat. Itu sebabnya saya katakana bahawa kalaulah perkara ini dibawa dan dimaklumkan pada Tuan ACP ada kemungkinan you may not have granted the remand order. Itu sahaja, bukan saya kata definitely. Ada kemungkinan.

ACP Habibi: Ada kemungkinan.

[64] We find that D3's evidence and the absence of any evidence from D2 would show there was no basis for the second arrest and the detention under the SOSMA.

[65] It bears reminding that this court had in *PP v. Khairuddin Abu Hassan & Anor* [2017] 4 CLJ 701 said as follows at p. 714:

> [34] .... The scheme and the provisions of SOSMA were designed to limit the fundamental liberties under arts. 5, 9, 10, and 13 of the Federal Constitution and to depart from the procedures laid down under the Criminal Procedure Code, the law which governs the conduct of criminal cases. Although SOSMA merely regulates the trial of the offences and does not create the said offences (see *PP v. Yazid Sufaat & Ors* [2014] 2 CLJ 670; [2015] 1 MLJ 571), undoubtedly a person charged and tried under SOSMA will lose his liberty as he will be denied bail. In this regard, the learned judge was of the view that in interpreting SOSMA the court should be guided by the principle of giving full recognition to the fundamental rights and freedoms. We found no error in the approach taken by the learned judge.

It follows that the power given pursuant to s. 4(5) of the SOSMA to detain should give full recognition to the plaintiff's fundamental rights and freedom.

Non-justiciability

[66] The plaintiff was remanded pursuant to a remand order granted by the Magistrate from 18 September 2015 until 23 September 2015. It was contended by the defendants the remand was a judicial act and can only be challenged by an appeal or a criminal revision by the High Court.

[67] We find that *Hassan Marsom* provides the complete answer at p. 447 as follows:

> [114] The respondent in the instant appeal had in his amended statement of claim pleaded and prayed for a declaration that his detention was unlawful and a transgression of his fundamental rights under art. 5 of the Federal Constitution. *In law, he has a choice either to pursue his cause either by way of the procedures provided under Chapter XXXI of the CPC or by the very action he undertook in this case. He must be allowed to have the choice of bringing an action in a civil court as an alternative to the procedures provided under Chapter XXXI of the CPC. In fact, it would be more cumbersome on his part to adopt the procedures under the CPC and to subsequently file a claim in the civil court*. A sheer waste of time and resources, we would add. *The High Court, being a court*

A *of unlimited jurisdiction has an inherent power to correct any wrong that had been done in breach of any written law and to declare the legality or otherwise of any act purportedly done or exercised pursuant to powers conferred under the law.*

(emphasis added)

[68] Essentially, this means that any challenge to the unlawfulness of a B remand order is not limited to an appeal or revision under the CPC but can still be pursued if specifically pleaded in a civil action. This has been done in our instant case.

Prospective Effect

C **[69]** It was contended by the defendants that before the High Court and Court of Appeal ruled that s. 124L of the PC was not an offence under the SOSMA, the provision was still good law, when the plaintiff was charged. Reference was made to *ASP Poonnam E Keling & Ors v. Sri Sanjeevan Ramakrishnan* [2023] 10 CLJ 1 that there is generally no retrospective application such that the arrest under SOSMA until the High Court decision D meant that the detention was lawful. We find such a contention untenable as retrospectively or otherwise does not negate the plaintiff's cause of action at the material time.

Finding

E **[70]** We therefore find and agree with the HCJ that the plaintiff has proven its claim on unlawful detention.

Malicious Prosecution

[71] The plaintiff's claim for malicious prosecution is for the period F 12 October 2015 to 12 May 2017 spanning 591 days. This is for the period when he was charged under s. 124L of the PC until his discharge and acquittal in the Sessions Court.

[72] As to the elements of malicious prosecution, we refer to *Rawther* at p. 203 (MLJ):

G In any such action the plaintiff must prove at least five things and unless he does so he cannot succeed. *He must prove that the defendant set the criminal law in motion against him. He must prove that the criminal proceedings against him terminated in his favour, that the defendant had no "reasonable and probable cause" for setting the law in motion against him and that the plaintiff was actuated by* H *malice in the sense that he had a motive other than only to carry the law into effect*. And for historical reasons (the action was originally in case) he must prove damage.

(emphasis added)

[73] Out of the five elements, the plaintiff was found to have proved three I elements, including that of no reasonable and probable cause but had not proved malice.

[74] We find and agree with the HCJ that D5 did not know the reason for the plaintiff being charged under s. 124L of the PC as he was only following the instruction to prosecute and he was not involved during the consideration and decision-making process to charge the plaintiff, it was the Solicitor General 1 who would know. Refer to encl. 4/208. There was essentially no evidence on reasonable and probable cause.

[75] In addition, the prosecution's documents which were served on the plaintiff did not contain anything to show sabotage. Reference may be made to encl. 5/142 as to what these documents were:

Lampiran "A"

1. Laporan Polis THSL repot: 31165/15
2. Laporan Polis THSL repot: 31283/15
3. Laporan Polis Sentul repot: 16899/15
4. Laporan Polis Sentul repot: 17764/15
5. Laporan Polis Sri Hartamas repot: 325/15
6. Laporan Polis Sri Hartamas repot: 371/15
7. Salinan Percakapan 112 Khairuddin bin Abu Hassan
8. Salinan Pasport Khairuddin bin Abu Hassan

[76] Nothing was produced as to the documents which D3 had said earlier when justifying the 28 days remand on gathering of documents from abroad and recording of statements from witnesses. D5 was not even sure whether the five reports which the plaintiff lodged abroad were part of the prosecution documents. This was asked and answered in encl. 4/216:

HK: Saya juga mencadangkan bahawa kelima-lima Laporan Polis di negara luar yang terkandung di dalam kertas pertuduhan yang telah kita rujuk tadi iaitu di Perancis, Switzerland dan sebagainya tidak langsung terkandung di dalam kertas siasatan mulai dari tarikh pendakwaan sehingga ditarik balik pendakwaan setuju tak setuju?

Datuk Masri: Saya tidak dapat memberikan kepastian berhubung perkara tersebut.

[77] As to what is reasonable and probable cause, this was said by *Rawther* at p. 204 (MLJ):

As to what is "reasonable and probable cause" in this connection it is not necessary to go beyond the following definition by Hawkins J in *Hicks v. Faulkner* which was approved by the House of Lords in *Herniman v. Smith:*

> *I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.*
>
> (emphasis added)

[78] Under the circumstances, we find that the plaintiff has shown the absence of reasonable and probable cause, where the defendants were unable to rebut the plaintiff's case when they did not even know the reasons for the charge under s. 124L of the PC.

[79] It was contended by the plaintiff that the HCJ having found there was no reasonable and probable cause, the HCJ ought to have found that the claim for malicious prosecution had been proved. We are unable to accede to such a contention.

[80] In *Rawther*, the Federal Court recognised two competing needs in malicious prosecution. At p. 203 (MLJ) this was said:

> Any action for malicious prosecution raises questions of difficulty. *On the one hand there is the need to protect the reputation of the individual against unjustified attacks and his pocket against the expense of defending himself against unjustified criminal proceedings. On the other hand the Courts have always recognised the necessity of affording protection to persons who, whatever their real motives, assist in the administration of public justice*. As was said by Viscount Simonds in the case of *Glinski v. Mclver*:
>
> > in such cases as these the liberty of the subject is involved on the one side, and on the other the risk that the citizen in the performance of his duty may be embarrassed if a jury too readily given a verdict in favour of a plaintiff who been prosecuted and acquitted.
> >
> > (emphasis added)

[81] These competing needs then ties in neatly with the principle enunciated in *A v. State of New South Wales & Anor (A v. NSW)*, referred to by the HCJ, that reasonable and probable cause and malice are separate elements and serve different purposes. Refer to para. 117 of *A v. NSW*.

[82] These two separate elements represent the balance struck as illustrated by the following paragraphs:

> 51 … Much of the development of the law concerning malicious prosecution reflects the attempts to balance the provision of a remedy where criminal processes have been wrongly set in train with the need not to deter the proper invocation of those processes. *The two requirements of absence of reasonable and probable cause, and malice, represent the particular balance that is struck.*
>
> ...

54 ... *It is on this basis that the tort has hitherto been understood as requiring proof of two distinct elements, one positive (malice) and the other negative (absence of reasonable and probable cause).* The two requirements meet the two different kinds of case posited in *Johnstone v. Sutton* – maliciously taking up a prosecution "for real guilt", and proceeding upon apparent guilt from circumstances which the prosecutor "really believes". That is, the positive requirement of malice, and the negative requirement of absence of reasonable and probable cause, *each have a separate role to play in the tort*. A conclusion about malice does not render irrelevant the inquiries about what the prosecutor did make, and should have made, of the material available when deciding whether to initiate or maintain the prosecution." (emphasis added)

[83] As to what constitutes malice, the court said:

55. For immediate purposes *it suffices to describe malice as acting for purposes other than a proper purpose of instituting criminal proceedings*. Purposes other than a proper purpose include, but are not limited to, purposes of personal *animus* of the kind encompassed in ordinary parlance by the word "malice". It also suffices to refer for the moment to what the prosecutor "made" or "should have made" of the available material without pausing to explore what is meant by those expressions. It will be necessary to return to these topics.

...

90. No little difficulty arises, however, if attempts are made to relate what will suffice to prove malice to what will suffice to demonstrate absence of reasonable and probable cause. In particular, attempts to reduce that relationship to an aphorism - like, absence of reasonable cause is evidence of malice, *but malice is never evidence of want of reasonable cause - may very well mislead*. Proof of particular facts may supply evidence of both elements. For example, if the plaintiff demonstrates that a prosecution was launched on obviously insufficient material, the insufficiency of the material may support an inference of malice as well as demonstrate the absence of reasonable and probable cause. No universal rule relating proof of the separate elements can or should be stated.

91. *What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law - an "illegitimate or oblique motive". That improper purpose must be the sole or dominant purpose actuating the prosecutor*.

92. Purposes held to be capable of constituting malice (other than spite or ill will) have included to punish the defendant and to stop a civil action brought by the accused against the prosecutor. But because there is no limit to the kinds of other purposes that may move one person to prosecute another, malice can be defined only by a negative proposition: a purpose other than a proper purpose. And as with absence of reasonable and probable cause, to attempt to identify exhaustively when the processes of the criminal law may properly be invoked (beyond the general proposition that they

A should be invoked with reasonable and probable cause) would direct attention away from what it is that the plaintiff has to prove in order to establish malice in an action for malicious prosecution - a purpose other than a proper purpose.

(emphasis added)

B **[84]** Therefore, due to the competing needs in malicious prosecution, reasonable and probable cause and malice are separate elements which serve two different purposes. It is thus in that context that the absence of reasonable and probable cause does not equate to the presence of malice.

[85] Refer also to *Miazga v. Kvello Estate* [2009] 3 RCS 339 where it was said C at p. 381:

[88] *While it may have made sense in the context of historical private prosecutions to infer malice from absence of reasonable and probable cause in certain circumstances, a public prosecution presents a very different context*. A finding of absence of reasonable and probable grounds on the objective standard is entirely D equivocal in terms of a Crown prosecutor's purpose, particularly given that reasonable prosecutors may differ on whether a certain body of evidence rises to the requisite threshold. Likewise, a conclusion that a prosecutor lacked a subjective belief in sufficient cause but proceeded anyways is equally consistent with non-actionabie conduct as with an improper purpose.

E (emphasis added)

[86] *Rawther* requires that the defendants were "actuated by malice in the sense that he had a motive other than only to carry the law into effect". *A v. NSW* puts it as "collateral purpose is shown to have provoked or driven the prosecution" or where "the dominant purpose ... must be a purpose other F than the proper invocation of the criminal law".

[87] Here, what was put forth as malice by the plaintiff was that the prosecution was to abet and provide fraudulent assistance to DS Najib in the 1MDB matter and to safeguard his interest in the same. Refer to paras. 40 and 49 of the amended statement of claim as follows:

G

40. The plaintiff states that all the acts of abuse of the process committed by all the defendants against the plaintiff are solely for the abetting to provide fraudulent assistance to Dato' Sri Mohammad Najib Bin Tun Abdul Razak as the Prime Minister of Malaysia and/or the Minister Finance and/or Chairman of the H 1MDB Board of Advisors on the issue of 1MDB raised by the plaintiff, through police reports as specified in paragraphs 10 to 19 above.

...

I 49. The plaintiff also claims that all the unlawful and/or negligence committed by all the defendants are solely for the purpose of safeguarding the interests of Dato' Sri Mohammad Najib Bin Tun

Abdul Razak as the Prime Minister of Malaysia and/or the Minister of Finance and/or the Chairman of the Advisory Board 1MDB's Board of Directors regarding the issue of 1MDB.

[88] Refer also to Q&A 40 and 49 of the plaintiff's witness statement and his cross-examination. In cross-examination he confirmed paras. 40 and 49 of the amended statement of claim (encl. 4/88) and the contents of his Q&A 40 and 49.

[89] The plaintiff was essentially relying on the absence of reasonable and probable cause to point to malice which we have earlier found cannot be the case. The plaintiff has to prove malice premised on its assertion that the prosecution was to abet and provide fraudulent assistance to DS Najib in the 1MDB matter and to safeguard his interest in the same.

[90] It is this assertion of malice that has not been proved. As correctly held by the HCJ at para. 94 GOJ, the plaintiff had not proved that the prosecution was driven by a collateral purpose to protect DS Najib nor the dominant purpose to cover up the activities of DS Najib.

[91] The plaintiff next relied on a series of newspaper reports to show that malice could be inferred when the authorities picked up on what was reported after DS Najib said such investigation was sabotaged. So for instance, DS Najib was reported to have stated that the investigation on 1MDB to bring down economic confidence and to have first used the words "economic sabotage" (encl. 5/116). Further, there were reports of the task force investigations (encl. 5/114) and reports of investigations of other countries (encl. 5/121-130). In addition, there were reports of the task force investigations (encl. 5/114). However as per the evidence of D3 in re-examination, these reports were not the basis of the investigations (encl. 4/195) and such reports could not be 100% conclusive (berdasarkan laporan media tidaklah 100%, encl. 4/196).

Finding

[92] The outcome is thus that it has not been proved that the prosecution was actuated by malice other than only to carry the law into effect or that the dominant purpose was to assist and protect DS Najib on matters relating to the 1MBD investigation.

Damages

General Damages

Unlawful Detention

[93] For unlawful detention, the plaintiff is proceeding on RM25,000 per day x 62 days = RM1,550,000. The amount was taken with reference to *Abd Malek Hussin v. Borhan Hj Daud & Ors* [2008] 1 CLJ 264 where unlawful

detention of 24 hours would be in the region of RM25,000 to RM30,000. The multiplicand and multiplier approach was also used. Refer to para. 52 of *Abd Malek Hussin*.

[94] At paras. 100 and 104 the HCJ explained his preference for a lump sum award to be more appropriate and there is no downward or upward adjustment taking into account various factors including aggravating factors. The HCJ also considered that damages are intended as compensation and not as enrichment. Ultimately, RM300,000 was awarded as general damages and was to be in between death in custody and defamation (para. 105 GOJ).

[95] We find nothing plainly wrong in the HCJ approach of a lump sum award and the amount. The HCJ was mindful of the loss of freedom during the period of detention (para. 98) and that there were no allegations of assault or ill treatment.

Malicious Prosecution

[96] Using the same multiplicand and multiplier approach, the plaintiff was prepared to accept a quarter of RM25,000 giving RM6,000 x 591 days = RM3,693,750.

[97] We have earlier accepted the lump sum award approach. Following the plaintiff's submission of a quarter of the daily amount for unlawful detention, we would award RM75,000 (a quarter of RM300,000), if the claim for malicious prosecution had been allowed.

Exemplary Damages

[98] It is the plaintiff's submission that in line with *Rookes v. Barnard* that the claim falls under the first category namely "oppressive, arbitrary or unconstitutional action by the servants of the government".

[99] In *Sambaga Valli* it was said at p. 13 (CLJU); p. 797 (MLJ):

> [33] The exemplary damages or punitive damages – the two terms now regarded as interchangeable – *are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a "contumelious disregard" for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff.* (See *Rookes v. Barnard* [1964] 1 All E R 347; *AB v. Southwest Water Services* [1993] All E R 609; *Broome v. Cassell & Co* [1971] 2 Q B 354, *Laksamana Realty Sdn Bhd v. Goh Eng Hwa And Another Appeal* [2006] 1 MLJ 675).
>
> (emphasis added)

[100] Although *Sambaga Valli* is often cited to justify an award of exemplary damages, the court also reminded at p. 18 (CLJU); p. 800 (MLJ): A

> [43] Before departing, *we would like to emphasis again that exemplary damages are not intended to compensate the plaintiff and are not recoverable as a matter of right. The amount of the exemplary damages award is left to the judge's discretion and is determined by considering the character of the defendant's misconduct, the nature and extension of the plaintiffs injury and the means of the defendant. The quantum of exemplary damages to be awarded must be appropriate to the wrongdoing inflicted to the parties involved*. Exemplary damages must not be uncontrolled or arbitrary; they must be of an amount that is the minimum necessary to achieve their purpose in the context of the particular case. (emphasis added) B C

[101] Heeding that reminder, we find and agree with the HCJ that the action of the defendants were not oppressive or arbitrary such that exemplary damages are warranted to signify the court's indignation and disapproval. The cited case of *Abd Malek Hussin* was one of "vile assault, unspeakable humiliation and prolonged physical and mental ill-treatment" as stated vividly at p. 288 line E. That is certainly not the case here. D

Aggravated Damages

[102] *Sambaga Valli* also stated as follows at p. 13 (CLJU); p. 797 (MLJ): E

> **[32]** Now, *aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.* (emphasis added)

[103] Here, we find no such exceptional conduct of the defendants that would warrant the award of aggravated damages. As the HCJ found at para. 121 GOJ, the defendants may have been misguided or overzealous in their pursuit but these were not accompanied by malevolence, spite, malice, insolence or arrogance. F

Special Damages G

[104] The plaintiff had claimed special damages of RM795,000 for legal fees for defending the proceedings instituted by the defendants against him.

[105] The legal fees can be found in a letter dated 14 June 2017 from the plaintiff's lawyer to the plaintiff and the relevant part states as follows: H

> Merujuk kepada kesemua perkara di atas iaitu berhubung permohonan reman di Mahkamah Tinggi, Rayuan Pendakwaraya ke Mahkamah Rayuan, Notis Usul Pendakwa Raya ke Mahkamah Persekutuan dan Pendakwaan terhadap anda di Mahkamah Sesyen, sepertimana yang telah dibincangkan dan dipersetujui oleh anda dan pihak kami di dalam perjumpaan-perjumpaan yang diadakan di pejabat kami berhubung perkara-perkara di atas, fi-fi kepeguaman pihak kami yang masih tertunggak adalah seperti berikut: I

Bil	Perkara	Jumlah
(a)	Tindakan dan nasihat-nasihat berhubung dengan penahanan mulai 18.9.2015 sehingga 12.5.2017	RM50,000.00
(b)	Permohonan *Habeas Corpus* di Mahkamah Tinggi	RM50,000.00
(c)	Permohonan Semakan Kehakiman melalui surat bertarikh 12.10.2015	RM20,000.00
(d)	Notis Usul yang difailkan di Mahkamah Tinggi untuk mendapatkan Perintah-Perintah bahawa pertuduhan di bawah Seksyen 124L Kanun Keseksaan yang ditampilkan terhadap anda adalah tidak tergolong sebagai pertuduhan untuk dibicarakan di bawah Peruntukan Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 (SOSMA 2012) sehingga pelepasan di Mahkamah Tinggi.	RM150,000.00
(e)	Hujahan di Mahkamah Persekutuan melalui rujukan di bawah Perkara 128 Perlembagaan Persekutuan pada 3.11.2015	RM75,000.00
(f)	Kehadiran terhadap rayuan Pendakwa Raya di Mahkamah Rayuan dan bantahan terhadapnya melaiui Hujahan Bertulis dan Hujahan Lisan pada 13.12.2016	RM75,000.00
(g)	Kehadiran terhadap rayuan Pendakwa Raya di Mahkamah Persekutuan dan bantahan terhadapnya melaiui Hujahan Bertulis dan Hujahan Lisan pada 27.4.2017	RM75,000.00
(h)	Kesemua kehadiran sebutan Pengurusan Kes dan bantahan-bantahan yang telah dikemukakan di Mahkamah berhubung pertuduhan terbabit sehingga memperolehi pelepasan dan pembebasan pada 12.5.2017.	RM300,000.00
	JUMLAH	RM795,000.00

[106] As correctly found by the HCJ, the legal fees are special damages and must be pleaded and particularised. At para. 61(d) this was pleaded:

> WHEREAS, the plaintiff claim against the defendants, on separate and jointly as follows:
>
> (d) The special damages for all costs incurred by the plaintiff including but without limitation to the legal costs agreed to be paid to the plaintiff's solicitors at all material times during the cause of this action;

[107] The statement of claim was first filed on 4 May 2018, by which time the fee letter dated 14 June 2017 had been issued. It was entirely possible for the plaintiff to plead the amount as it was already known and the particulars, but it was not done. It is trite law that special damages must be specifically pleaded.

[108] The HCJ also found that the legal fees was not strictly proved. All that was produced was the fee letter but no retainer agreement was produced which would have shown the basis of the calculation of the legal fees. The plaintiff's response was that as per the fee letter, the fees were agreed between the parties. If it had been agreed, the issue arises why then did the plaintiff not pay and the plaintiff lawyer waited about four years without demanding payment. Although it was explained the lawyer would decide before the limitation period, this lends credence that the services could have been rendered *pro bono* and perhaps even an afterthought.

[109] The contention by the plaintiff that this was not special damages as it had not been paid flies in the face of its own pleadings at para. 61(d) where legal fees were pleaded as special damages.

[110] We find and agree that this claim has to fail for want of particulars and in any event, has not been proved.

Outcome

[111] Appeal 692 by the plaintiff is dismissed.

[112] Appeal 713 by the defendants is dismissed.

[113] The decision of the HCJ is affirmed.

[114] As both appeals have been dismissed, we order that each party bears its own costs.